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Supreme Court of the United States

OCTOBER TERM, 1933.

THE TEXAS AND PACIFIC RAILWAY COMPANY,
Petitioner,
v.
S. O. POTTORFF, Receiver of The First National Bank of El Paso, Texas,
Respondent.

No. 128.

BRIEF ON BEHALF OF ILLINOIS CENTRAL RAILROAD COMPANY.

CHARLES N. BURCH,
EDWARD W. SMITH,
Amici Curiae.

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No. 128.

BRIEF ON BEHALF OF ILLINOIS CENTRAL RAILROAD COMPANY.

May It Please the Court:

This brief is filed in pursuance of the following personally signed stipulation filed in this cause:

"STIPULATION.

"The parties to the above entitled and numbered cause, and their counsel, hereby consent to the filing of an amicus curiae petition and/or brief in this cause by Charles N. Burch and Edward W. Smith on behalf of the Illinois Central Railroad Company.

"Dated this 2nd day of September, 1933.

S. N. Russell,
Del W. Harrington,
T. D. Gresham,
M. E. Clinton,
Counsel for Petitioner.
Thornton Hardie,
Counsel for Respondent."

The questions discussed herein are:

(1) May a national bank make a valid pledge of part of its assets to secure the deposit of a private depositor, and

(2) Even though such pledge be invalid, may the receiver of a national bank recover the pledged assets without returning to the depositor his deposits?

The Illinois Central Railroad Company is deeply interested in the result of this litigation, for the reason that the same questions involved herein are likewise involved in the case of *Illinois Central Railroad Company vs. A. F. Rawlings, Receiver of Planters National Bank of Clarksdale, Mississippi* (recently decided by the United States Circuit Court of Appeals for the 5th Circuit, but not yet officially reported), and the Illinois Central Railroad Company is now engaged in the preparation of a petition for certiorari which will shortly be filed in this court for the purpose of seeking a review of the decision of the United States Circuit Court of Appeals in the said Rawlings case. The decision of the Circuit Court of Appeals in the Rawlings case is the same in substance and effect as the decision of said court in the instant Texas and Pacific case.

We fully approve the petition for certiorari and brief in support thereof which has been filed by the Texas & Pacific Railway Company in this cause, and in view of the conflict of opinion in lower federal courts, as well as the conflict of opinion in state courts, and the importance of the questions involved, it is respectfully submitted that this court should grant the petition for certiorari herein.

This conflict of opinion was pointedly referred to by the Circuit Court of Appeals for the 7th Circuit in *Sneeden v. City of Marion*, 64 Fed. (2) 721, in the following language:

> "The courts in this country are not in accord as to whether national or state banks may pledge their assets as security for deposits of public or private money. This diversity of opinion has arisen by reason of the difference of state statutes, and a contrariety of economic views in applying the Federal statute and in formulating state policies." (p. 722.)

The Circuit Court of Appeals for the 4th Circuit in *Schumacher v. Eastern Bank & Trust Company*, 52 Fed. (2) 927, said:

> "Whether a bank may pledge its assets for the security of an ordinary deposit is a question as to which there is conflict of authority. For cases denying such power, see Smith v. B. & O. R. Co. (D. C.), 48 Fed. (2) 861, Divide County v. Baird, Receiver, 55 N. D. 45, 212 N. W. 236, 51 A. L. R. 296; Farmers' & Merchants' State Bank v. Consolidated School District, 174 Minn. 286, 219 N. W. 163, 65 A. L. R. 1407. For cases asserting it, see Ward v. Johnson, 95 Ill. 215; Ahl v. Rhoads, 84 Pa. 319; Cameron v. Christy, 286 Pa. 405, 133 A. 551; Richards v. Osceola Bank, 79 Iowa 707, 45 N. W. 294; McFerson v. National Surety Co., 72 Colo. 482, 212 P. 489; Ex parte Grand Lodge, G. U. O. O. F. (State ex rel. Bradley v. People's Federation Bank), 147 S. C. 103, 144 S. E. 841; Williams v. Hall, 30 Ariz. 581, 249 P. 755; Grigsby v. People's Bank, 158 Tenn. 182, 11 S. W. (2d) 673. And as bearing on the question generally, see notes

in 51 A. L. R. 313, and 65 A. L. R. 1412. Although some of the cases draw a distinction between a pledge of assets to secure a deposit of public funds and a pledge to secure a private deposit, there would seem to be, in the absence of statute, *no valid basis for such distinction;* and this court has expressly upheld a pledge of assets by a national bank to secure a deposit of funds. Burrowes v. Nimocks, supra."

HAS A SOLVENT NATIONAL BANK THE POWER TO PLEDGE PART OF ITS ASSETS TO SECURE THE DEPOSITS OF A RAILROAD COMPANY, SUCH PLEDGE AGREEMENT BEING ENTERED INTO IN GOOD FAITH BY THE PARTIES THERETO?

The powers of national banks are set out in 12 United States Code Annotated, Sec. 24 (R. S., Sec. 5136) et seq. Among the powers conferred are:

"Third. To make contracts." and * * *.

"Seventh. To exercise by its board of directors, or duly authorized officers or agents, subject to law, *all such incidental powers as shall be necessary to carry on the business of banking;* by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; *by receiving deposits;* by buying and selling exchange, coin, and bullion; by loaning money on personal security; and by obtaining, issuing, and circulating notes according to the provisions of this chapter.

"But no association shall transact any business except such as is incidental and necessarily preliminary to its organization, until it has been authorized by the Comptroller of the Currency to commence the

business of banking. (R. S., Sec. 5136; July 1, 1922, c. 257, Sec. 1, 42 Stat. 767.)"

It will thus be seen that national banks are given the broad power of making contracts and "all such incidental powers as shall be necessary to carry on the business of banking * * * by receiving deposits."

The natural and obvious construction of this language is that as the bank is given power of receiving deposits, it may prescribe the terms and conditions under which said deposits are received and may make contracts looking to the safety or security of such deposits. The powers granted are broad and general and properly so, as Congress plainly intended to leave to the judgment and discretion of the officers of such banks the manner in which deposits would be received and the conditions under which they would be received, subject, however, to the supervision of the Comptroller of the Currency.

And so it is, as the court judicially knows, that some banks will accept a deposit account only in excess of a certain amount, the amount varying in different banks; some banks pay interest on checking deposits and some banks do not; some banks receive deposits only during certain hours of the day and other banks observe different hours. As to all such matters we assume that it will not be denied that national banks may exercise their own judgment and discretion.

Ordinarily banks seek and desire to retain deposits, as deposits represent a large part of the capital upon which banks operate, and generally this capital is furnished by depositors without the payment of any interest by the banks.

There is nothing immoral in a bank pledging its assets to secure deposits. There is no statute prohibiting such pledging. What has been done is neither *malum in se* nor *malum prohibitum*. As said by the Supreme Court of Indiana in the recent case of *Schornick v. Butler*, 185 N. E. 111:

> "We find no constitutional or statutory enactments, no practices of officials, or judicial decisions in this state indicating that the pledging of collateral to secure deposits is against public policy. *There is nothing inherently wrong or immoral in such a transaction.*"

There is no federal statute prohibiting a national bank from pledging its assets to secure a private depositor, nor is there any rule or regulation or order issued by the Comptroller of the Currency to prohibit such pledging. If there had been such a rule or regulation it would certainly have been produced by the receiver. We are dealing, therefore, with an act which is neither immoral nor inherently wrong. On the other hand, it is a highly commendable act for a railroad company, which owes the duty to the public of honest and efficient management and operation, to make every proper effort to conserve its revenues so that the public may be properly served.

As indicating the view which Congress takes of the pledging of assets to secure deposits, it is to be noted that Congress puts the imperative duty upon the Secretary of the Treasury to require national banks "to give satisfactory security" for the safekeeping of public money of the United States. (12 United States Code Annotated, Sec. 90.)

It must therefore be accepted as settled that there is nothing wrong from a moral standpoint and nothing in violation of any statute in the pledging of assets to secure deposits, but on the other hand such a practice (certainly so far as public money is concerned) has the positive approval of Congress.

We are here in a court of equity and are stressing the importance of the character of the act which has been done in order to bring clearly to the attention of the court the fact that the depositor (Texas & Pacific Railway Company) is in court with clean hands and entitled to relief unless such relief is forbidden by some positive rule of public policy, not yet legislatively announced by Congress or judicially announced by this court.

The court below, however, in this case proceeded on the theory that national banks had not been granted the power to pledge their assets to secure private depositors and hence, the power not having been granted, did not exist and therefore the pledge agreement is invalid. The court below held specifically that the bank "had no such power" and pointedly rejects the proposition that "the giving of pledges for private deposits is a reasonable incident to the business of receiving deposits and necessary to the proper conduct of the business of a national bank."

As we have already seen, national banks are given "all such incidental powers as shall be necessary to carry on the business of banking" * * * "by receiving deposits." National banks have been in existence since the Act of Congress of June 3, 1864, a period of sixty-nine years. The numerous decisions of state and federal courts dis-

cussing the validity of pledges to secure deposits, whether public or private, show that the practice of pledging assets to secure deposits is a well known one, and one that has been in existence for many years.

In a recent opinion the Supreme Court of Tennessee said, relative to the practice of giving security for deposits:

> "It is a practice followed by many banks. We are unable to draw any substantial distinction between transactions where a bank borrows money for a specified time, or receives it on deposit for a stated period, or receives it on deposit subject to check. *In either case the relationship is the same—debtor and creditor*—the bank receives and uses the money of the creditor, to its profit, on a promise to repay.
>
> "As was stated in *Trust Co. v. Rose,* supra, it is for the *legislature* to say whether a sound public policy forbids such a transaction as this record presents."
>
> Grigsby v. The People's Bank, 158 Tenn. 193.

With utmost deference to the opinion of the court below, it is respectfully submitted that whether the pledging of assets to secure deposits is one of the "incidental powers" granted to national banks and whether such power is "necessary to carry on the business of banking" is one which the Comptroller of the Currency, with his expert knowledge of the subject of banking, is in a better position to determine than are the courts, and the fact that the practice has been in vogue for many years and has not been prohibited by any Act of Congress or by any general order of the Comptroller of the Currency is in and of

itself an expression by Congress and the Comptroller that the practice is a proper one, even though, in individual instances as to particular pledges, the Comptroller may have "scolded" or disapproved. As stated by Judge Dickinson in his dissenting opinion in *B. & O. R. Co. v. Smith,* 56 Fed. (2) 799: "Actions speak louder than words." It is inconceivable that the Comptrollers of the Currency during a period of sixty-nine years, having knowledge of the practice, would not have issued a general order forbidding same if the practice were wrong in principle. Said Judge Dickinson (p. 804):

> "We are not as much impressed by the opinions of individual comptrollers as the majority of the court has been. We grant the rule of construction that when the executive has construed an act of Congress in order to carry it into effect that the courts will not lightly change the executive interpretation of the meaning of the act. It may be and usually is disrupting to so do. There has, however, been no such executive or administrative construction given to this act. The practice has of late grown up, and recent happenings in banking circles has doubtless furthered it for depositors, particularly those carrying large balances such as railroads, trustees for estates, and banking institutions to ask for and receive security for their deposits. Comptrollers have known of this. Some of them have doubtless scolded; but they have permitted it, and one or two of them have publicly announced their disapproval of the practice. Actions speak louder than words. All disruption there may be, will result from the ruling that the banks are without the power to do this."

It is also a fair assumption that Congress itself would have prohibited such a general practice by express statutory prohibition if the practice were wrong in principle or detrimental to public interests.

A FAIR CONSTRUCTION OF THE ACTS OF CONGRESS INDICATES THAT IT HAS ALWAYS BEEN ASSUMED THAT NATIONAL BANKS HAVE THE POWER TO PLEDGE SECURITIES TO SECURE PRIVATE DEPOSITS.

An examination of the legislation of Congress will show that national banks have the power to secure deposits, whether public or private.

As already shown, there is first granted in broad terms and without restriction "all such incidental powers as shall be necessary to carry on the business of banking" * * * "by receiving deposits": Later, however, in the same legislation the attention of Congress was directly challenged as to the security of deposits and, by Section 90 of 12 United States Code Annotated, relative to national banking associations, it is provided:

> "The Secretary of the Treasury *shall* require the associations thus designated to give satisfactory security, by the deposit of United States bonds and otherwise, for the safekeeping and prompt payment of the public money deposited with them."

By *requiring* security for public money deposited in banks, Congress necessarily assumed that national banks had the power to give security, to be exercised at the option of such banks, and, assuming that national banks already had such power, Congress merely took away the

option of such banks as to giving security and mandatorily required that such security should be given for public money of the United States. We respectfully submit that the requirement that such security shall be given, inevitably implies the premise that the power to give security already existed, and so it is in other Acts of Congress relative to various kinds of public money, Congress, assuming that the power to give security already existed, mandatorily required that security shall be given.

A reference to the other acts are set out in the margin.*

In Section 24, giving national banks "all such incidental powers as shall be necessary to carry on the business of banking * * * by receiving deposits," the word "deposits" is simply used. The expression is not private deposits or public deposits but the word "deposits" includes all kinds of deposits whether public or private or semi-public or semi-private.

Congress, therefore, knowing that banks receive both private and public deposits and having had its attention challenged to security for deposits, plainly intended by its legislation that, so far as public deposits of the Govern-

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*As to receivership moneys, 39 Stat. 121, 12 USCA Sec. 192; as to making land and joint stock banks depositories, 39 Stat. 365, 12 USCA Sec. 701; as to postal service funds, 39 Stat. 159, 39 USCA Sec. 759; as to depositories of public moneys, 45 Stat. 492, 12 USCA Sec. 332; as to Indian moneys, 36 Stat. 1070, 25 USCA Sec. 156, and 40 Stat. 591, 25 USCA Sec. 162; as to the deposit of money received from the sale of United States bonds, 40 Stat. 504, 31 USCA Sec. 771.

ment are concerned, security *must* be given, but so far as private deposits are concerned the giving of security was left to the determination and judgment of individual banks acting under the jurisdiction and supervision of the Comptroller of the Currency.

The construction for which we are contending is supported by the Attorney General of the United States, for in (1915) 30 Op. Atty. Gen. 341, it was said relative to Sec. 90 of 12 USCA:

> "It is believed that this section is more reasonably construed *as a recognition of the existence of the power on the part of national banks to give security for deposits* than as a grant by implication of authority to give security for *Government deposits alone.*"

We submit, therefore, that the right of national banks to give security for private deposits has been assumed by Congress since 1864 and similarly assumed by the Attorneys General and by the Comptrollers of the Currency for the same period.

We now come, however, to an amendment of Section 90 of 12 United States Code Annotated, said amendment being the Act of June 25, 1930, reading as follows:

> "Any association *may,* upon the deposit with it of public money of a *State or any political subdivision thereof,* give security for the safe-keeping and prompt payment of the money so deposited, of the same kind as is authorized by the law of the State in which such association is located in the case of other banking institutions in the State. (As amended June 25, 1930, c. 604, 46 Stat. 809.)"

As will be seen, this amendment has reference, not to the public money of the United States but to the public money "of a state or any political subdivision thereof."

The statement of this amendment is not that security shall be given but security *may* be given and it is therefore contended by the Receiver that as the act only grants authority to give security for the public moneys of a state or political subdivision thereof, therefore, it was the plain intention of Congress to withhold the power to give security for a private deposit. This is a plain *non sequitur* for the following reasons: in the first place, it was known that national banks did give security to private depositors and if Congress had intended to stop such practice it would have been prohibited by express enactment; second, the history of the passage of this Act of 1930 shows that it was passed merely to quiet doubts of some timid national bankers and to confirm in direct and positive statutory form a power (though already existing) to national banks so that they could compete with state banks, which were obtaining state deposits by giving security therefor.

The history of this legislation is thus set out in *B. & O. v. Smith,* 56 Fed. (2) 802:

> "In Senate Report No. 67, 71st Cong. 2nd Sess., the committee based its favorable report upon a letter from the Attorney General of Minnesota, reading in part as follows: 'The United States district court for this district has held that it may not thus pledge its assets to secure private deposits and the trend of authority generally seems to be to the effect that a bank may not in any case pledge its assets to secure a deposit unless authorized by law so to do. The

national banks of this State have pledged with the State and the various subdivisions thereof millions of dollars in Government and other bonds as security for public deposits. They are anxious to be permitted to do so, and we are willing that they should. Under the law as it now stands we may be taking a chance in accepting such pledges from the national banks, and we should like to have the chance removed by legislation in Congress which will specifically authorize such pledges by national banks.' ".

"From House Report No. 1657, 71st Cong. 2d Sess., it appears that the committee reported favorably upon the bill (S. 486) because of a request from the Acting Secretary of the Treasury, reading in part as follows: 'While the office of the Comptroller of the Currency has consistently taken the position that national banks *have the right to give security for the safe-keeping and prompt payment of public moneys of the State or political subdivision thereof deposited with such national banking associations,* several recent decisions have thrown some doubt on this question with the result that in some States the State banks may secure the public deposits, but the officers of the State are in doubt about depositing with the national banks in the absence of any specific law by Congress on the subject. It would be extremely helpful, therefore, if it is possible for your committee to report out, and the House pass, S. 486.' "

From this it appears that the Comptrollers of the Currency have always assumed and taken the position that national banks have the right to give security for state funds, county funds and municipal funds. Such assump-

tion is correct and is necessarily based upon the proposition that the original power given of carrying on a banking business "by accepting deposits," clearly included the power to give security for deposits, whether such deposits were public funds of the United States, public funds of a state, county or city, or private funds of a private depositor. The Comptroller of the Currency could not consistently and logically assume that national banks had the power to give security for the funds of a municipality unless at the same time he necessarily assumed that there was similar power to give security for the deposits of a private depositor. The one assumption accompanies the other assumption and, as said by the Attorney General of the United States in 30 Op. Atty. Gen. 341, quoted above, the recognition of the existence of the power on the part of national banks to give security for deposits is not to be confined to "government deposits *alone.*"

In view, therefore, of the long practice of giving security for private deposits and in view of the history of the passage of the amendatory act of 1930, it cannot be doubted that the power to give security for private deposits has always been a power which national banks have had, and there is no room for the application of the doctrine of *expressio unius exclusio alterius.* As said by Judge Dickinson in his dissenting opinion in *B. & O. v. Smith,* supra:

> "It is true that there are now acts which expressly confer authority to secure public deposits but none to secure private deposits. *The genesis of such acts* takes away all significance which they might otherwise have in respect to the question under discussion.

> Some official was concerned over the deposit of public moneys for which he was responsible. He asked for relief and Congress gave it to him without concerning itself with the effect of the legislation upon others. Legislatures not infrequently do this. Had these provisions been part of the original act which conferred the power, they would have great significance. If, however (as we think is true), the original act gave the power, the question becomes, not whether the subsequent legislation confers it, but whether it takes away a power before given. We suppose no one would urge that it does."

Likewise, Judge Alschuler in his dissenting opinion in *Sneeden v. City of Marion,* 64 Fed. (2), page 732, said:

> "The act was calculated to remove any doubt of the right of the national banks to be on the same footing as the state banks of the several states."

In view therefore of the history of the passage of the Act of June 25, 1930, amending Section 90 of 12 U. S. C. A., it is perfectly clear that the object of said act was to put in clear, positive and statutory form a power already existing, so that national banks, in their competition with state banks for state deposits, might be able to refer to a positive statute conferring power to give security for state deposits, rather than relying upon the general power, already existing, as set out in general terms in Section 24 of 12 U. S. C. A.

The whole object of the legislation was to aid national banks in their competition with state banks for deposits. At the time of the passage of this act of 1930, Congress

knew that national banks had private deposits as well as public deposits and while it was on the subject of security for deposits, Congress, if it had intended to prohibit security for private deposits, would certainly have said so, as Congress must be presumed to have known that the practice of giving security for private deposits had been in effect for many years.

THE MEANING OF THE WORD "NECESSARY."

In Section 24 of 12 U. S. C. A., national banks are given "all such incidental powers as shall be necessary to carry on the business of banking" * * * "by receiving deposits."

Plainly the word "necessary" is not intended to mean elemental or rudimentary wants. Plainly it is intended to mean reasonably necessary, useful or convenient. In order to receive deposits a national bank need not own its own building, it can rent a building, yet we assume no one would contend that it had no power to own a building because ownership was not absolutely necessary for the receiving of deposits and transacting other banking business, whereas renting a building would do just as well. (Sec. 29 of 12 U. S. C. A.) Likewise deposits could be received in a plain, unornamented building, but we suppose no one would contend that a national bank does not have the power to have marble counters, tile floors, and nickel-plated cages merely because less ornamental surroundings would be sufficient for the receiving of deposits.

We think the construction which Chief Justice Marshall gave to the word "necessary" in *McCullough v. Maryland*, 4 Wheaton 316, 4 L. Ed. 579, is final on this subject.

Said he (referring to the meaning of the word "necessary" as used in Sec. 8, Art. 1 of the Constitution):

> "If reference be had to its use, in the common affairs of the world, or in approved authors, we find that it frequently imports no more than that one thing is *convenient*, or *useful*, or essential to another."

The meaning of "necessary" in this connection has already been so fully discussed in the brief filed by the Texas & Pacific Railway Company that we forbear from further discussion.

A BANK GIVING SECURITY FOR DEPOSITS NOT DISTINGUISHABLE IN PRINCIPLE FROM A BANK BORROWING MONEY ON A DEMAND NOTE SECURED BY COLLATERAL OF THE BANK.

Concededly a national bank has power to borrow money on a demand note and to secure the loan by the pledging of collateral of the bank, but such transaction is in no way different in principle from pledging collateral to secure a deposit. Both transactions create the simple relation of debtor and creditor. As said by this court in *Auten v. United States National Bank of New York*, 174 U. S. 142:

> "The very first banking in England was pure borrowing. It consisted in receiving money in exchange for which promissory notes were given payable to bearer on demand, and so essentially was this banking as then understood, that the monopoly given to the Bank of England was secured by prohibiting any partnership of more than six persons 'to borrow,

owe, or take up any sum or sums of money on their bills or notes payable at demand.' And it had effect until 1772 (about thirty years), when the monopoly was evaded by the introduction of the deposit system. The relations created are the same as those created by the issue of notes. In both a debt is created—the evidence only is different. In one case it is a credit on the banker's books; in the other his written promise to pay. In the one case he discharges it by paying the orders (checks) of his creditor; in the other by redeeming his promises. These are the only differences."

ASSUMING THE PLEDGE OF ASSETS TO SECURE A PRIVATE DEPOSITOR IS INVALID, THAT IS, ULTRA VIRES, MAY THE RECEIVER OF THE NATIONAL BANK HOLD THE DEPOSITS OBTAINED BY VIRTUE OF THE PLEDGE AND STILL, AT THE SAME TIME, REQUIRE A RETURN OF THE PLEDGED ASSETS TO HIM?

The record herein is clear that the deposits would not have been made by the Railway Company unless security had been given by the bank. The record is also clear that at the time the deposits were made the bank was solvent and the pledge agreement was made in good faith. It seems plainly inequitable on its face that the receiver of a national bank may hold both the deposits of the railway company and also require the return to him of the pledged assets. However, the United States Circuit Court of Appeals for the Third Circuit has so held by a divided court in *B. & O. v. Smith,* 56 Fed. (2) 799, and likewise the Circuit Court of Appeals for the 5th Circuit has so held in the instant case of *Texas & Pacific Railway Com-*

pany v. Pottorff, 63 Fed. (2) 1, and in the case of *Illinois Central Railroad Company v. Rawlings, Receiver* (not yet officially reported).

It is respectfully submitted that these decisions are in conflict with the decisions of this court and with the opinion of the United States Circuit Court of Appeals for the 4th Circuit in *Schumacher v. Eastern Bank & Trust Company*, 52 Fed. (2) 925.

In the Schumacher case just referred to there were advances made by the Eastern Bank & Trust Company of Newbern, N. C., to the First National Bank at Newbern, N. C., the national bank assigning and pledging certain of its assets to secure such advances. The court discusses at some length whether these advances were to be considered as loans made by the trust company to the national bank or as deposits made by the trust company in the national bank. However, either situation constituted the relation of debtor and creditor and the question was, even though the national bank may have exceeded its powers and even though the trust company may have exceeded its powers, did the receiver of the national bank have the right to hold both the money advanced and at the same time insist on the return of the assets pledged to secure this advance? This question was answered in the negative. In the course of the opinion the court said:

> "Of course, a pledge of assets in contemplation of insolvency for the sake of creating a preference is avoided by section 5242 of the Revised Statutes (12 USCA Sec. 91); but, in the absence of a preferential transfer in contemplation of insolvency, there is no

federal statute under which a pledge of assets as security for a loan or *deposit* may be avoided. See Paton's Digest of Banking Law (1926), Vol. 1, Sec. 641."

And:

"But at all events, we must decide the question presented on the basis of the inherent nature of the transactions, and not with reference to their form. Neither the fact that the trust company exceeded its legal limit of loans, nor that the bank sought to avoid showing an increase of bills payable, would have authorized the bank to retake the securities it had pledged for the repayment of the money borrowed (Nat. Bank v. Matthews, 98 U. S. 621, 25 L. Ed. 188; 7 C. J. 713 and cases cited); and it is well settled that, where there is no preferential transfer in contemplation of insolvency, *the receiver has no greater right in securities pledged than the bank itself would have had.* See Burrowes v. Nimocks, supra, and cases there cited."

Schumacher v. Eastern Bank & Trust Co., 52 Fed. (2) 925.

In *Union National Bank v. Matthews*, 98 U. S. 621, there was drawn in question the power of a national bank to take as collateral security for a note another note which was secured by a deed of trust on real estate. The question was one of the powers of the bank under the national banking laws now under consideration. In that case the court said:

"A court of equity is always reluctant in the last degree to make a decree which will effect a forfeiture.

> The Bank parted with its money in good faith. Its garments are unspotted. Under these circumstances, *the defense of ultra vires,* if it can be made, does not address itself favorably to the mind of the Chancellor."

And in the same case the court quoted with approval the following from Sedgwick on Statutory and Constitutional Construction:

> "Where it is a simple question of authority to contract, arising either on a question of regularity of organization *or of power conferred by the charter, a party who has had the benefit of the agreement cannot be permitted in an action founded upon it to question its validity.* It would be in the highest degree inequitable and unjust to permit a defendant to repudiate a contract, the benefit of which he retains."

The same equitable principle is expressed by Chief Justice Marshall as to a party attempting to claim both under and against a will:

> "It is the maxim in a court of equity not to permit the same person to hold *under and against a will.*" *Herbert v. Wren,* 7 Cranch, 378.

In the case at bar the effect of the decision of the Circuit Court of Appeals is to allow the receiver of the bank to retain the benefits of the pledge contract (that is, the deposits) and at the same time to repudiate the pledge of the bank to secure said deposits. This feature of the case has already been so fully discussed in the brief filed by the Texas & Pacific Railway Company that we will close this brief by referring to two recent deci-

sions of state courts of the highest respectability and authority.

In the recent case of *State Bank of Commerce v. Stone*, 261 N. Y. 175, 184 N. E. 750, the Court of Appeals of New York, after holding that the state bank there involved had no implied powers under the laws of New York to pledge assets for security for private deposits, yet at the same time held that a corporation cannot retain what it has received under an ultra vires contract and at the same time refuse to perform the contract. In the case under discussion the bank had become insolvent and suit was brought by the Superintendent of Banks to recover the pledged assets. In disposing of the case the New York court said:

> "This leads to the conclusion that the agreement made by the State Bank of Commerce of Brockport, N. Y., with the defendant, and the pledge of $15,000 in bonds to secure a $5,000 deposit, was contrary to law and beyond the power and authority vested in the officers of the bank.
>
> "This does not necessarily mean, however, that the judgment of the courts below must be reversed, as we have to consider the effect of *ultra vires*. In pledging these bonds, the officers were acting for and on behalf of the bank, and for its business, apparently seeking to obtain deposits which, under the Bank Law, it was authorized to receive. They applied the deposits to the bank's business, and the bank has had and received the benefit of the money due to the agreement which the bank made, and the bonds which it delivered as security. Under these circumstances, it would not be just for the bank or its creditors to

accept all the benefits and repudiate the burdens, unless the acts of the bank be in violation of some direct and positive statute. Whatever the difference of view there may be as to the effect of ultra vires on corporate contracts, *in no jurisdiction can a party retain what it has received under such a contract and refuse to perform the contract.* Appleton v. Citizens' Central Nat. Bank of New York, 190 N. Y. 417, 83 N. E. 470, 32 L. R. A. (N. S.) 543; American Surety Co. v. Philippine Nat. Bank, 245 N. Y. 116, 156 N. E. 634, where the authorities in this state are reviewed.

"The judgment and orders below must therefore be affirmed to the extent in which they have required the defendant to return the pledged bonds *upon the repayment of the deposited money, with interest.*" (p. 754.)

In the case of *Schornick v. Butler, et al.,* ..... Ind. ....., 185 N. E. 111, decided March 28, 1933, there was under consideration the pledging of assets by a bank and the right of the receiver of the bank to hold deposits and at the same time require a return of the pledged assets. In disposing of the case the court said:

"Under the depository statute the bank might have pledged eligible bonds directly to the municipality as security for its deposits. The transaction here is no different in effect. The securities were pledged to the appellees, who, in turn, pledged themselves to secure the deposits. In either case the pledged securities were only liable to the extent of the cash actually deposited. The bank parted with an interest in the securities equal to the deposit subject to the condition that, to the extent to which it repaid the cash, it

would reclaim the securities. It amounts to no more than a sale of securities at their actual value for cash. *The general creditors of the bank lost nothing by the transaction,* and, if they are affected at all, they are benefited since the bank is more liquid by reason of having the cash rather than the securities. The appellees gained nothing. The public deposit or its proceeds was used, or will be used, for the payment of general creditors of the bank. No more than an equal amount of the pledged notes will be withheld.

"The action sounds in equity. The general creditors of the bank or the appellant, their representative, cannot be heard to say that the pledging of the securities was illegal while they retained the benefits of the transaction. Melaven v. Hunker et al., 35 N. M. 408, 299 P. 1075.

" 'It would be unconscionable to permit the general creditors to profit where they had no loss, at the expense of the appellees, who have profited nothing and have done no wrong. It must not be permitted unless there is some insuperable rule of law which requires it.

" 'Justice alone can be considered in a court of chancery, and technicalities never be tolerated except to obtain and not to destroy it.' " (p. 112.)

In the case at bar the receiver, of course, has no greater rights or powers than the banking corporation for which he is acting as receiver. *Scott v. Armstrong,* 146 U. S. 507.

The First National Bank of El Paso, Texas, while a going concern, would not have been permitted to retain

the railroad deposits and at the same time demand the return to it of the pledged assets, and so likewise the receiver Pottorff of said national bank has no greater or higher right, title or claim than the bank itself.

As said by Chief Justice White in *Fourth State National Bank v. Yardley*, 165 U. S. 653:

> "The receiver took no greater rights in the property of the insolvent bank which came into his possession than that which the insolvent bank possessed."

It is respectfully submitted that a case is not only made out for the granting of the writ of certiorari but also for a reversal of the decree of the court below.

Respectfully submitted,

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Amici Curiae.

Emphasized words herein are those of the Amici Curiae.